Restaurant Corporation of America *and* Hotel and Restaurant Employees Union, Local 25, Hotel Employees and Restaurant Employees International Union, AFL-CIO. Cases 5-CA-13407 and 5-CA-13921

21 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 9 September 1982 Administrative Law Judge Peter E. Donnelly issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings and findings,[1] but not to adopt certain conclusions of the recommended Order.[2]

1. The judge found that the Respondent disparately enforced its no-solicitation rule.[3] He also found that the Respondent unlawfully suspended and then discharged employees Herbekian and Dameron based on its disparate enforcement of the no-solicitation rule. The judge concluded that the suspensions and discharges violated Section 8(a)(3) of the Act. We agree with these findings and conclusions.

2. The judge found, contrary to the General Counsel, that the Board's *T.R.W.*[4] decision should not be given retroactive effect. He therefore declined to find the Respondent's no-solicitation rule overbroad and invalid, and did not rely on the rule itself as an additional basis for finding the suspensions and discharges unlawful. We adopt the judge's ultimate conclusion but not the underlying rationale.

The Respondent promulgated and maintained the following no-solicitation rule:

> SOLICITATION OF ANY KIND, INCLUDING SOLICITATION FOR CLUBS, ORGANIZATIONS, POLITICAL PARTIES, CHARITIES, ETC. IS *NOT* PERMITTED ON WORKING TIME OR IN CUSTOMER AREAS. DISTRIBUTION OF LITERATURE OF ANY KIND IS *NOT* PERMITTED ON WORKING TIME OR WORKING AREAS. OFF-SHIFT EMPLOYEES ARE *NOT* ALLOWED ON THE PREMISES.

The rule was lawful when adopted in 1975. See *Essex International*, 211 NLRB 749 (1974), which held that rules prohibiting solicitation and distribution during "working time" are presumptively valid. The Board thereafter decided *T.R.W.*, which held that "working time" rules are presumptively invalid.

The Board has recently overruled *T.R.W.* to the extent that it conflicts with the standards set forth in *Essex*. See *Our Way, Inc.*, 268 NLRB 394 (1983). Relying on *Our Way*, we find that the Respondent's 1975 no-solicitation rule is lawful on its face. We therefore conclude that maintaining the rule did not violate Section 8(a)(1), and that the rule on its face does not provide a basis for concluding that the suspensions and discharges of Herbekian and Dameron were violative of the Act.

3. The judge found that the Respondent violated Section 8(a)(1) of the Act by promising employees better benefits if they reject the Union as their collective-bargaining representative.

On 14 June 1981 a conversation took place between Renee Loustaunau, manager of Les Champs Restaurant and the Peacock Lounge, and Mary Shea, a Peacock Lounge waitress. During the conversation Loustaunau stated that a union would be bad for the employees since only waiters and waitresses would benefit a little in wages and would have to pay for union dues and pension funds, adding that the kitchen help was already paid union scale. Shea then raised the matter of employee insurance, expressing dissatisfaction with the Respondent's plan. The judge found that Loustaunau replied that this is "off the record" and that she did not want to sound as if she were bribing Shea, "But I heard that they've been investigating changing the medical plan." Loustaunau added that she had heard "a rumor that they had been investigat-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act by interrogating its employees concerning their union activities. We find it unnecessary, however, to rely on the testimony of Charatsri Maneepanth, and note that her testimony would be cumulative of the testimony on which we do rely.

We correct the judge's inadvertent reference to James "Huttice." The record shows that the proper surname is "Suttice."

[2] We shall order the Respondent to remove from its files any reference to the unlawful suspensions and discharges of Roxie Herbekian and Sherwood Dameron. See *Sterling Sugars*, 261 NLRB 472 (1982). We shall also modify the judge's reinstatement language to conform to that traditionally used by the Board.

[3] We adopt the judge's decision to the extent he finds that the incidents of permitted nonunion solicitation were not isolated, but do not rely on the charity breakfast project to support that finding. We also find it unnecessary to rely on the judge's discussion at sec. III, A, 4, par. 12, concerning employee sales of Avon products.

[4] *T.R.W., Inc.*, 257 NLRB 442 (1981).

ing since last January a new medical plan. But these things take time."

The judge found that "[i]mplicit in such remarks is the message that a union would not improve [the employees'] lot and a promise that if given a chance, i.e., without unionization, the Respondent would improve employee health benefits." The judge concluded that Loustaunau's remarks violated Section 8(a)(1) of the Act.

We disagree. Shea raised the employee insurance issue as well as her dissatisfaction with the Respondent's plant. Thus, it was Shea who prompted Loustaunau's statement reporting that she had heard "a rumor" that the Respondent had been "investigating" a new medical plan since January, i.e., prior to the union campaign. In addition, there is no evidence that Loustaunau's response was untruthful, and she also assured Shea that the response was not intended to sound like a bribe. Under all these circumstances, we cannot find that Loustaunau's statement amounted to a promise of improved benefits, or that she conditioned any improved benefits on employee rejection of the Union. We therefore conclude that the Respondent did not violate Section 8(a)(1) as alleged.

Conclusions of Law

1. Restaurant Corporation of America is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel and Restaurant Employees Union, Local 25, Hotel Employees and Restaurant Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees about their union activities and the union activities of their fellow employees, the Respondent violated Section 8(a)(1) of the Act.

4. By selectively and disparately applying its no-solicitation rule, the Respondent violated Section 8(a)(1) of the Act.

5. By unlawfully suspending and discharging Roxie Herbekian and Sherwood Dameron, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Restaurant Corporation of America, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities and the union activities of their fellow employees.

(b) Selectively and disparately applying a no-solicitation rule.

(c) Suspending, discharging, or otherwise discriminating against employees for engaging in union and protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Offer Roxie Herbekian and Sherwood Dameron immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful suspensions and discharges and notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Washington, D.C. places of business copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

MEMBER ZIMMERMAN, dissenting in part.

I dissent from my colleagues' reversal of the judge's finding that the Respondent impliedly promised to improve employee health insurance benefits in violation of Section 8(a)(1) of the Act. I find that a balanced analysis of all the evidence requires adoption of the judge's findings.[1]

On 9 June 1981, in the midst of a union organizing drive, union adherents Roxie Herbekian and Sherwood Dameron were discharged pursuant to the disparate enforcement of the Respondent's no-solicitation rule in violation of Section 8(a)(3) and (1) of the Act. On 14 June Mary Shea, a waitress in the Peacock Lounge, asked Lounge Manager Renee Loustaunau why Herbekian and Dameron were discharged and whether it was because of their union activity. Hedging, Loustaunau answered that the Respondent did not want a union because it would represent a personal failure for her and Eugene Flick, the general manager, both of whom were new in their jobs. Loustaunau went on to say that the Union would be bad for employees; that, since the kitchen help already received union scale, only the waiters and waitresses would benefit with slightly higher wages; and, in any event, that any wage increase would just go back to the Union for dues and pension funds. Shea said that her complaint was with the Respondent's benefit package, especially the health insurance plan, which she characterized as "lousy." While expressing hope that she did not appear to be "bribing" Shea, Loustaunau, in response, offered, "off the record," that she "heard that they've been investigating changing the medical plan . . . since last January. . . . But these things take time." Loustaunau said that the new general manager seemed extremely concerned about employees, and suggested that he be given a chance.

My colleagues find no violation in Loustaunau's remarks concerning the possibility of a new medical plan being offered the employees, primarily because they believe it was "prompted" by an employee complaint. But their finding ignores the fact that the conversation between Loustaunau and Shea was initiated by Shea's inquiring whether Herbekian and Dameron had been discharged for their union activities. Loustaunau, while not answering the question directly, replied that the Respondent did not want a union, that a union would be bad for the employees, and that, at best, a union would benefit only a few. Given this context, which surely is far different from one stemming from the mere voicing of a complaint,[2] the remarks of Loustaunau take on a meaning that, as found by the judge, imply that unionization would not improve the lot of the employees and represent a promise that, if permitted the opportunity, the Respondent would improve health benefits.

The implication of Loustaunau's statement is not nullified by the fact that Shea introduced the subject of health insurance to the conversation. At no time did Shea ask whether the Respondent was considering changes in the employee benefit package or whether there was a chance of improved health benefits. To the contrary, her comments were in the nature of a response to Loustaunau's ruminations as to why Shea and others were interested in a union.[3] Nothing Shea said compelled Loustaunau to divulge a heretofore confidential management plan. Yet, Loustaunau held out the prospect of relief on the sole aired matter of employee concern, in the process inviting Shea and her fellow employees to give the new management a chance, without the Union, to show its stated concern for employees.

This conclusion is not negated by the fact that Loustaunau assured Shea that her remarks were "not intended to sound like a bribe." No such self-serving disclaimer of intent can dispell the clear thrust of Loustaunau's remarks indicating that the Respondent's employees would do as well, if not better, without the Union, particularly with respect to health benefits.

Accordingly, I find, as did the judge, that the Respondent violated Section 8(a)(1) of the Act by impliedly promising to improve the employees' health benefits.

[1] I also dissent from the majority's finding that the Respondent's no-solicitation rule was not unlawful on its face. Although I agree with them that *Our Way* should be applied retroactively, for the reasons set forth in my dissent in that case, I adhere to the Board's holding in *T.R.W.* that no-solicitation rules couched in terms of "working time" are ambiguous in meaning and scope, and therefore are unlawful.

[2] Unless of course by "complaint" my colleagues are referring to Shea's expressed concern that her coworkers had been fired unlawfully.

[3] As much as conceded by Loustaunau in her testimony when, on being specifically asked whether the subject of health benefits was raised by Shea in the form of a question, she could only answer with assurance that the subject came up in the context of a discussion about the Union and that Shea said that employees had a gripe about the Respondent's benefit plan.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively question you about your union support or activities and the union support or activities of your fellow employees.

WE WILL NOT selectively or disparately apply our no-solicitation rule.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for engaging in protected concerted or union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Roxie Herbekian and Sherwood Dameron immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their suspension and discharge and that the suspension and discharge will not be used against them in any way.

RESTAURANT CORPORATION OF AMERICA

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The original charge in Case 5-CA-13407 was filed by Hotel and Restaurant Employees Union, Local 25, Hotel Employees and Restaurant Employees International Union, AFL-CIO (the Union or Charging Party) on June 12, 1981. A first amended charge was filed on July 10, 1981, and a complaint and notice of hearing thereon issued on August 26, 1981. An answer thereto was timely filed on September 2, 1981. An amendment to complaint and notice of hearing in Case 5-CA-13407 issued on December 21, 1981. The charge in Case 5-CA-13921 was filed by the Union on December 7, 1981. An order consolidating cases, amended complaint, consolidated complaint and notice of hearing in both cases issued on February 16, 1982, alleging violations of Section 8(a)(1) by Restaurant Corporation of America (Respondent or the Employer) in the maintenance of an unlawful overly broad no-solicitation rule as well as coercive 8(a)(1) statements. Also alleged were the discharges of Roxie Herbekian and Sherwood Dameron pursuant to the rule.[1] An answer thereto was timely filed on March 1, 1982. Pursuant to notice, a hearing was held before an administrative law judge at Washington, D.C., on March 31 and April 1 and 2, 1982. Briefs have been timely filed by Respondent and the General Counsel which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is a District of Columbia corporation with an office and place of business in the District of Columbia, where it is engaged in the operation of food service facilities at the Watergate complex. During the past 12 months, the Employer received revenues valued in excess of $500,000 from the operation of its business. The complaint alleges, the answer admits, and I find that Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[2]

1. Unlawful Interrogation by Richard Sultoni

In early June 1981,[3] shortly prior to Dameron's discharge, chef's helper Victor Sangster was approached by Dameron and given an authorized card. Shortly thereafter, while he was working, Sangster was approached by chef Richard Sultoni who asked if anyone had approached him about joining the Union. Sangster told him that he had been approached a long time ago by someone about the Union. Sultoni replied that he was talking about recently and Sangster denied it. When asked "what if" anyone approached him about a union, Sangster told him that he did not know much about unions, but if anyone approached him he would let him (Sultoni) know. Sultoni asked him what he thought about the Union and Sangster replied, "I think it's good and it's bad." Sultoni did not testify at the hearing and I credit Sangster's unrebutted account of this incident.

[1] In the absence of opposition the General Counsel's motion to withdraw the allegation of the complaint concerning illegally creating the impression of surveillance (par. 5(b)) is granted.

[2] There is conflicting testimony regarding some allegations of the complaint. In resolving these conflicts I have taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corrboration or lack of it; and consistencies or inconsistencies within the testimony of each witness, and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically on his or her demeanor and make my findings accordingly. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco Inc.*, 159 NLRB 1159, 1161 (1966).

[3] All dates refer to 1981 unless otherwise indicated.

In another incident, in early June 1981, prior to Dameron's suspension on June 9, Tiep Bui, a cashier, was solicited by Dameron on behalf of the Union to sign an authorization card and spoke to her in favor of the Union. That evening, Sultoni, apparently aware that she had been given an authorization card, asked her who had given her the card and she told him that it was Dameron. Sultoni asked if she had signed it and she said that she had not. He asked her where the card was, and she said that she had forgotten it at home. Once aagin without the benefit of Sultoni's testimony, I credit Bui's unrebutted account of this conversation.

Another employee, cashier Charastri Maneepanth, was approached by Dameron in early June, prior to his discharge. Dameron spoke to her concerning the benefits of unionization and solicited her to sign an authorization card. She told him that she would think about it and kept the card without signing it. The following day Sultoni asked her who had given her the authorization card and she replied that Dameron had given it to her. Noting once again Sultoni's failure to testify, I credit Maneepanth's unrebutted version of this incident.

2. Implied promises of better health insurance benefits by Renee Loustaunau

On Sunday, June 14, Mary Shea, a waitress in the Peacock Lounge, spoke to Renee Loustaunau, manager of the Les Champs Restaurant and Peaccock Lounge, about the discharges of Dameron and Herbekian. The conversation took place in the terrace area of the Peacock Lounge where Loustaunau was having lunch. Shea testified that she inquired about the reasons that Dameron and Herbekian were fired and Loustaunau told her it was because they had broken the Company's no-solicitation rule. Shea asked if union activity was the reason for their discharges, and without answering directly, Loustaunau told her that Respondent did not want a union because it would be a personal failure for both herself and Eugene Flick, the new general manager, who were both new in their jobs, and that a union would be bad for the employees as well since only waiters and waitresses would benefit a little in wages and would have to pay for union dues and pension funds and that the kitchen help was already paid union scale. Shea raised the matter of employee insurance, expressing dissatisfaction with Respondent's plan. According to Shea, Loustaunau told her that this is "of the record" and she did not want to sound as if she were bribing Shea, "But I heard that they've been investigating changing the medical plan," and that she had heard "a rumor that they had been investigating since last January a new medical plan. But these things take time." Loustaunau testified that when Shea said that Respondent had a "lousy" health insurance plan she told Shea "there had been rumors flying around for years that they were going to do something about the health insurance plan." And that she also said in that respect, "I mentioned the fact that we had a new manager, and that he seemed to be somebody that was extremely concerned about employees. And I remembered specifically saying that I thought that the new management should be given a chance."

Another employee, a waiter named Terrance Mayfield, testified that he overheard some of his conversation and that Loustaunau told Shea that the Company was looking into the matter of new insurance policies, but that it was supposed to be kept quiet, and the employees were not supposed to know about it and that Respondent would give information later. Having reviewed the entire record and noting in particular the corrobative nature of Mayfield's testimony, I am satisfied that Shea's account of the conversation is the more accurate.

3. Alleged coercive remarks by Gene Flick

James Huttice had worked as a union waiter for 17 years in Detroit until he came to Washington in April 1981, at which time he transferred into the Union.

He enlisted the help of his brother-in-law DeCarlo Blackston in a search for work after he arrived in Washington. It appears that Blackston and Flick had worked together in the past and in an effort to capitalize on that relationship, Huttice and Blackston paid a visit to Flick's office about September 28. Huttice was given an employment application to fill out by Flick's secretary Margaret Tickner. Shortly thereafter Flick arrived, and Blackston and Huttice joined him in his office, where Huttice finished filling out the application.

Huttice testified that during the course of the conversation Blackston told Flick that Huttice was a union member and Flick said that he could not use him and that it was not a "union house." Huttice responded that he did not need to work in a union house; that he needed a job. According to Huttice, Flick responded that if it came to a union vote among the employees, he knew which way Huttice would vote and therefore could not use him. Whereupon they shook hands and departed with Flick remarking that Huttice should leave his application with him and Flick would refer him to a "union house."

Flick testified that the meeting was held at Blackston's request for the purpose of having Huttice fill out an application. Flick testified that despite the fact that he was aware that there were no job openings at the time, that the filling out of the application was routinely requested of all job applicants.[4] With respect to the conversation in his office concerning Huttice's union membership, Flick testified that towards the end of the conversation Blackston told him that Huttice belonged to the union in Chicago, and Flick jokingly commented that he would know how he would vote, but Flick denied telling him that he would not hire him because he was a union member. According to Blackston, when he mentioned that Huttice had been a union member, Flick jokingly replied that if they had an election, "I think I would know how the vote would go," and they all laughed. Blackston states that he did not hear anything said by Flick about referring Huttice's application to a union house. Having reviewed the testimony concerning this incident, I conclude that the mutually corrobative accounts of Flick,

[4] Tickner also testified that she told Huttice and Blackston when they arrived that there were no jobs available. Blackston corroborates this testimony.

Blackston, and Tickner present the more accurate version and I credit it, and specifically, I credit Flick's denial that he told Huttice he would not hire him because he was a union member.

4. Discharge of Herbekian and Dameron

Roxie Herbekian sought work in early 1981, through the Union, in an organized restaurant. When she was advised that such work was not available, she looked for work in a restaurant with a prospect of being organized. Upon learning that an organizing effort was underway at the Watergate complex she applied for work and was hired there by Respondent on June 20 as a room service operator where she worked from 6:30 to 10:30 a.m.[5] In mid-March 1981, she also began working as a cocktail waitress in the Peacock Lounge where she normally worked from about 10:45 a.m. to 4 p.m. She normally had unpaid one-half hour lunchbreaks about 9:30 a.m. and 3 p.m.

With the approval of the Union, Herbekian began an organizational effort among the employees at the Les Champs and Terrace Restaurants as well as the Peacock Lounge in late May. From late May to early June, Herbekian spoke to about 10 employees, including an admitted supervisor, Paul Reynolds, assistant kitchen manager for Les Champs Restaurant who Herbekian invited to attend a union organizational meeting to be held on June 2. Reynolds told her that since he was "management" he would not attend.

It was during this period that Herbekian spoke to Sherwood Dameron to inquire if he would be interested in establishing a union. When Dameron responded affirmatively, Herbekian told him that she would be in touch with him later about setting up a union meeting.

On June 2, a union meeting was held at the Howard Johnson's Restaurant across the street from the Watergate complex. The meeting was attended by Ronald Richardson, secretary-treasurer of the Union, and about eight employees, including Herbekian and Dameron. An overall strategy was outlined, and lists of employees drawn up. Each received a list of employees to contact, along with authorization cards for the employees to sign. There were about four employees on Herbekian's list, although she subsequently solicited many more than four employees on behalf of the Union.

On the morning of Tuesday, June 9, Herbekian was summoned to Flick's office. Flick asked if she was aware of Respondent's no-soliciation rule. Herbekian responded that she was unaware of any no-solicitation rule, despite the unrebutted testimony of Loustaunau, which I credit, that the no-solicitation rule was posted by the timeclock, in the locker room, and on the bulletin board used by the employees at the Les Champs Restaurant and the Peacock Lounge. Flick told her that she was being given a 3-day suspension pending further investigation for violating the rule, and gave her a copy of the rule.[6] At 11 a.m. Herbekian punched out. On the following Monday, June 15, Herbekian returned to her job to find that she had been replaced. She waited for Flick to arrive, and when he did, Herbekian told him that it appeared that she was being fired and that she would like to know why, and to have it in writing. Flick confirmed that she was being fired for violating the no-solicitation rule but declined to give it to her in writing. Flick then gave Herbekian her paycheck and she left.

With respect to Dameron's discharge, as noted above, at the original organization meeting on June 2, the various employees in attendance were each given a list of employees to solicit. Dameron, like Herbekian, was given a list of several employees. During the following week Dameron solicited these employees on behalf of the Union, and sought to have them sign union authorization cards. Dameron testified that of those employees contacted by him concerning the Union only two, Bui and Maneepanth, were on paid worktime.

On Tuesday, June 9, about 2 p.m. Dameron was called into Flick's office and thereafter Jacques Mury, then food and beverage manager, joined them. Flick told him that he was being suspended for 3 days pending further investigation for talking to employees about the Union and soliciting union authorization cards since this was a violation of company policy against solicitation. Thereafter Dameron left Flick's office and departed the premises. On the following day Dameron called Flick to inquire about his employment status and Flick told him that he was being fired, but refused to give Dameron any written statement.

It appears the certain types of what can generally be described as nonunion soliciting activity took place among Respondent's employees, despite the existence of the no-solicitation rule. First there appears to have been solicitations of contributions for gifts by employees, including management employees, on various ocassions when employees left Respondent's employ. Thus, when waiter Rene Sanjines and housekeeper Sandy left, money was collected to purchase gifts for them. The record supports the conclusion that Loustaunau participated in these collections, and that the contributions were solicited mainly on worktime.

Similarly, Loustaunau participated in collecting money to buy a gift for Sultoni's new born baby and in collecting money to buy a going away gift (a blazer) for the Les Champs Restaurant assistant manager Bucky Black.[7]

Loustaunau was also involved in collecting money for the purchase of birthday cakes for bartender Tim Moran and waiter Steven Owens. While Loustaunau does recall her involvement in collecting for Moran's cake, she did

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[5] Respondent operates food service facilities at the Watergate apartments complex, which includes the Les Champs Restaurant, Peacoock Lounge, the Terrace Restaurant, a pastry shop, and a delicatessen.

[6] The no-solicitation rule reads:

SOLICITATION OF ANY KIND, INCLUDING SOLICITATION FOR CLUBS, ORGANIZATIONS, POLITICAL PARTIES, CHARITIES, ETC. IS *NOT* PERMITTED ON WORKING TIME OR IN CUSTOMER AREAS. DISTRIBUTION OF LITERATURE OF ANY KIND IS *NOT* PERMITTED ON WORKING TIME OR IN WORKING AREAS.

OFF-SHIFT EMPLOYEES ARE *NOT* ALLOWED ON THE PREMISES.

[7] Loustaunau testified that she did purchase the blazer, but did not solicit or even contribute to the cost of the blazer. In this regard however, a review of the testimony convinces me that Shea's testimony that she contributed $5 at Loustaunau's solicitation for the blazer is accurate, and I credit her version.

not recall participating in collecting for Owen's cake. However, in view of Dameron's testimony that she did solicit him for a contribution, I conclude that she did participate in that solicitation also, and further, in view of the unrebutted testimony of Dameron and Shea, I conclude that at least some of that solicitation took place on worktime.

The record also shows that at the suggestion of bartender Steve Evans Loustaunau organized a project to provide a charity breakfast for some of the derelicts or "street people" of Washington, D.C., at a local "soup kitchen." She solicited other employees to participate in this work and persuaded Respondent to contribute the food. About a week later, some 7 to 10 employees put on the breakfast one morning from 6 to 10. It is undisputed that the employees were late reporting to work and were not compensated for the lost time. Thus, as a result of this undertaking, those employees donated their time and sacrificed whatever amount of pay may have been involved for reporting late.

In connection with the solicitation by employees to buy Avon products, it appears that Dameron was solicited several times by Marta Diaz, a pantry employee, to buy Avon products while he was on the clock. Herbekian testified that she was once shown an Avon book by several working employees and later was solicited by Lupe Marta, a pantry employee, while both were on worktime. Herbekian actually placed an order with her, but was discharged before the order arrived. Sangster testified that several female pantry employees kept Avon books in the kitchen area. While the General Counsel concedes that none of the evidence establishes direct personal involvement by supervisors in the solicitation of Avon products, the frequency and openess of the solicitations justify the inference that Responent was aware of the worktime sale and solicitation of Avon products, particularly in view of Sangster's testimony that at some unspecified time after he learned of Dameron's discharge Sultoni told him that he was to tell the girls selling Avon products not to let him (Sultoni) see anymore Avon books or they would lose their jobs. However, since Sultoni could have acquired this knowledge of Avon solicitation after the discharges, this testimony does not support any predischarge condonation of Avon solicitation. In summary, despite the contentions of the General Counsel, this record does not support, by inference or otherwise, that Respondent was aware that Avon products were being sold by employees on worktime.

B. *Discussion and Analysis*

1. Allegations of 8(a)(1) coercion

With respect to Sultoni's conversation with Bui and Maneepanth, it is clear that interrogation about the circumstances of their having signed authorization cards would normally be unlawful as coercive of the employee rights guaranteed in Section 7 of the Act. Respondent argues that Sultoni's interrogation was conducted at Flick's request and was for the purposes of determining whether the no-solicitation rule had been violated. However, the testimony of Bui and Maneepanth does not support this contention and we are without the benefit of Sultoni's testimony since he did not testify. In these circumstances, I conclude that Sultoni's interrogation of Bui and Maneepanth violated Section 8(a)(1) of the Act.

As to Sultoni's conversation with Sangster, once again this interrogation must be viewed as an unlawful inquiry into the union activity of an employee in the absence of special circumstances to justify it. Respondent argues that the interrogation was so isolated and casual that a remedial order is not warranted. I do not agree. The facts fully support the conclusion that Sultoni's interrogation of Sangster was coercive in violation of Section 8(a)(1) of the Act, and I so find.

With respect to Loustaunau's remarks to Shea during the course of their conversation, it is clear that Loustaunau was attempting to "play down" the advantages of unionization. In meeting Shea's contention that the insurance plans were "lousy," Loustaunau told her that a new plan was under consideration and that the new management was concerned about the employees. Neither the source nor substance of this review were disclosed by Loustaunau. Implicit in such remarks is the message that a union would not improve their lot and a promise that if given a chance, i.e., without unionization, Respondent would improve employee health benefits. Such representations have an unlawfully inhibiting effect on the rights of employees to organize and violate Section 8(a)(1) of the Act.[8]

2. Retroactive application of the *T.R.W.*[9]

Respondent adopted the no-solicitation rule in issue in 1975. It is undisputed that at the time it was adopted it was lawful under existing Board law. At the time that Herbekian and Dameron were discharged, the no-solicitation rule was still lawful. Some 2 months after the discharge of Herbekian and Dameron for violation of the rule, the Board concluded in *T.R.W.* that rules prohibiting solicitation during "worktime" or "working time," without further clarification, are presumptively invalid. Under the principle of law enunciated in *T.R.W.*, Respondent's no-solicitation rule is presumptively invalid as prohibiting solicitation on "working time." The question is whether or not *T.R.W.* should be applied retroactively to the instant case to make unlawful those actions of Respondent, i.e., the discharges of Herbekian and Dameron, which were not unlawful at the time that they were done. In my opinion, retroactive application is inappropriate on the facts of this case.

While it is true, as the General Counsel points out, that new legal tests in some cases have been given retroactive effect by the Board, an evaluation must be made to ascertain whether justice is better served by retroactive application or denying it. As the General Counsel quite properly points out, the standard should be which course of action produces the fairer result.[10] The Gener-

[8] With respect to the allegations that Flick told Huttice he would not hire him because of his union membership, I have credited Flick in contradicting that this was not the case and accordingly I shall recommend dismissal of that allegation.

[9] *T.R.W., Inc.*, 257 NLRB 442 (1981).

[10] *Cormier Hosiery Mill*, 243 NLRB 19 (1979); *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

al Counsel argues that unless the discriminatees are reinstated the result would be that they will have been discriminated against for having exercised their statutory rights under Section 7 of the Act. However, focusing on this as controlling, is to disregard the fact that these were not employee rights at the time they were discharged. To confer these rights retroactively creates the greater mischief in the circumstances of this case. Industrial harmony requires that an employer be able to establish solicitation rules in conformity to existing Board law without doing so at its peril.

3. Disparate enforcement of the no-solicitation rule

As noted above, I have concluded that the Board's decision in *T.R.W.* should not be given retroactive effect so as to make unlawful the discharges of Herbekian and Dameron under the rule. Even assuming, as I do, for the purposes of the discharge allegations that the no-solicitation rule was valid, the issue of disparate enforcement of the no-solicitation rule in discharging Herbekian and Dameron remains. It is clear that where an employer allows solicitation for various nonunion purposes it may not selectively ban union solicitation or discharge employees for engaging in such solicitation. An overview of the Board law appears in *Sunny Land Packing Co.*, 227 NLRB 590, 596 (1976), in the following language:

> Where employees, with the knowledge and even participation of supervisory personnel, are permitted by an employer to solicit during worktime for various charities, functions, or causes to collect money for churches and fellow employees, and to sell numerous items for personal gain while at the same time the employer enforces a no-solicitation rule against employees soliciting on behalf of a union, such disparate enforcement of the no-solicitation rule is both unfair and violative of Section 8(a)(1) of the Act. . . . Further, the termination of [Employees] in pursuance of the unlawful enforcement of the no-solicitation rule is in violation of Section 8(a)(3) and (1) of the Act.

The record in the instant case disclosed that, during the year preceding Herbekian's and Dameron's discharges, certain types of nonunion solicitations were permitted by Respondent despite the broad prohibition of the no-solicitation rule.[11] These included solicitations of money for birthday gifts, going-away gifts, and, in one instance, a baby gift for the child of a supervisor, the chef. Solicitations also included money for birthday cakes for various employees and supervisors. In one instance employees were solicited to donate their time to provide a charity breakfast. Loustaunau participated in some of these solicitations and even initiated some of them, as set forth more fully above. Thus the record discloses during the year preceding the discharges, there were substantial deviations from the strictures of the posted no-solicitation rule.[12]

Respondent contends that these solicitations were isolated incidents of short duration and should be disregarded by the Board in considering the issue of disparate treatment. I do not agree.

It is undisputed that Herbekian and Dameron were discharged for violating the no-solicitation rule. The record makes it abundantly clear that Respondent allowed solicitation on company time and premises for the various solicitations noted above. Further, that Loustaunau, the restaurant manager, actually initiated and participated in several of the solicitations. While Respondent may argue that these solicitations were isolated or inconsequential, the record simply does not support this contention; they were numerous and substantial. Nor does the record disclose any adverse Respondent reaction to any of these nonunion solicitations. Against this background of condoned employee and supervisory solicitations, in violation of the rule, Dameron and Herbekian began to organize for the Union. Like the nonunion solicitations, these were conducted, at least in substantial part, on worktime. However, unlike the nonunion solicitations they were not condoned. Within a week after the union solicitations began, the no-solicitation rule was promptly and vigorously enforced with the discharges of Herbekian and Dameron. It is clear, as a matter of Board and court precedent, that the selective and disparate enforcement of a no-solicitation rule to prevent union solicitation is unlawful. Accordingly, I conclude that Herbekian and Dameron were discharged pursuant to a disparate enforcement of the no-solicitation rule, in violation of Section 8(a)(3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, as set forth in section III above, occurring in connection with Respondent's operations as described in section I above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent suspended and discharged Roxie Herbekian and Sherwood Dameron for reasons which offended the provisions of Section 8(a)(3) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay which they may have suffered as a result of this discrimination practiced against them. Backpay will be provided with interest to be computed in the manner described in *F. W. Woolworth*

[11] The express language of the rule prohibits solicitation and distribution "of any kind," including, among the prohibit solicitations, "charities, etc."

[12] The record does not go beyond the year preceding the discharges in this regard.

Co., 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[13]

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.
4. By unlawfully suspending and discharging Roxie Herbekian and Sherwood Dameron, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

[Recommended order omitted from publication.]

[13] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).